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No.

IN THE

Supreme Court of the United States

October Term, 1982

JAMES P. McDERMOTT,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Respondents.

Opposition to Petition for a Writ of Certiorari

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Preliminary Statement.

Respondents Rosalyn Yalow, Eugene Straus, Martin Cherkasky, Montefiore Hospital and Medical Center, Bronx-Lebanon Hospital and Fred Silverman, respectfully pray that the petition for writ of certiorari submitted by the petitioner, James McDermott, be denied in all respects. The petition sets forth no valid grounds for granting certiorari. Petitioner who has appeared *pro se,* claims alleged violations of his constitutional rights arising under the First, Fourth, Fifth, Ninth and Fourteenth Amendments and various enumerated federal statutes. The District Court found that the plaintiff-petitioner's

allegations failed to state a claim upon which relief could be granted and dismissed the complaint as frivolous as to all defendants. Further, the court certified that any appeal from such order *in forma pauperis* would not be taken in good faith. The claims made by the petitioner were reviewed by the Court of Appeals and were the subject of an additional, unsuccessful application for re-review by that court when it considered his petition for rehearing. It is respectfully submitted that the petitioner's claims have been given full and fair review by both the District Court and the Court of Appeals, both of which correctly concluded that the complaint fails to set forth a cause of action upon which relief can be granted. Accordingly, this case does not merit the granting of a writ of certiorari.

Statement of Facts.

The instant action evolves from a suit brought against some 200 named defendants[1] wherein the plaintiff seeks declaratory and injunctive relief as well as Thirty Million Dollars ($30,000,000.00) in damages for the alleged violation of his constitutional rights. The accusatory pleading avers that the intendment of the action is to:

> [R]edress past and present deprivation and prevent future deprivation by defendants and their agents, acting under color of State and federal law, statute, ordinace [*sic*], regulation, custom an [*sic*] usage of right, privileges and immunities secured by the United States Constitution, the Amendments thereto federal and state statutes and the Common Law. [¶3][2]

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[1]Point V of petitioner's reply brief before the Court of Appeals reduced the number of defendants. It is, however, respectfully submitted that the reduction in the number of defendants in no way affects the nature of the plaintiff-petitioner's accusatory pleading.

[2]The parenthetical references to numbered paragraphs refer to the paragraphs in the complaint.

Even with due deference afforded to the petitioner's *pro se* status, it must nonetheless be noted that the nature and quality of the complaint and the Petition makes any meaningful presentation of the facts a Herculean task. To the extent that the meaning and import of the allegations contained in the 69 page, 89 paragraph accusatory pleading can be discerned, they are so disjointed as to defy logical recitation. On appeal to the Court of Appeals, plaintiff-petitioner submitted a 52 page appellate brief containing 44 pages restating and supplementing the purported "facts." The accusatory pleading and appellate brief are essentially in the nature of a biographical treatise, wherein the plaintiff recounts every event during the past thirty years which has caused him annoyance or distress. The main thrust of the action, to the extent it can be identified, is a claim of an ill-defined conspiracy in which callous officials of the United States Government and private individuals purportedly participated with the intent to deny the plaintiff his constitutional rights.

Plaintiff's requests for relief include a demand for a declaration of the unconstitutionality of enumerated statutes [¶89(a), (b) and (c)], a permanent injunction against all defendants, with particular reference to the performance of medical experimentation [¶89(2)], a repudiation and revocation of the 1977 Nobel prize in Medicine [¶82(3) (b) and (c)] and Thirty Million Dollars ($30,000,000.00) in damages.

Petitioner identifies himself as a former member of the United States Armed Forces, who was hospitalized in a Veterans Administration Hospital and who was a member of a class of persons allegedly subjected to human experimentation there in December of 1977 [¶5]. The plaintiff, in his class allegation, claims that he also sues on behalf of all persons who were the subject of human experimentation on October 21, 1948, by agents of the

Veterans Administration [¶5]. Thus, the complaint initially targets October, 1948 and December, 1977 as the two operative dates; the remaining allegations in the accusatory pleading also attempt to document a variety of collateral grievances allegedly arising during the intervening years.

In addition, the complaint makes repeated references to various conspiratorial efforts identified by the home grown acronyms of SHARE [¶11], SWEDE [¶56] and ULTRA [¶35].

The complaint fails to indicate either the purpose of the purported conspiracy or any specific acts in furtherance thereof; however, petitioner does assert that numerous defendants participated therein. A review of the accusatory pleading reveals it to be a compendium of bizarre and disjointed allegations joined together by the all-pervasive claim of conspiracy.

Defendant-respondents Rosalyn Yalow, Eugene Straus, Martin Cherkasky and Montefiore Hospital and Medical Center were served on or about September 12, 1980. Defendant-respondents Bronx-Lebanon Hospital Center and Fred Silverman were served on or about October 28, 1980. Both groups of defendant-respondents moved to dismiss the complaint pursuant to Rule 12(b) (6) of the Fed.R.Civ.P. contending that the accusatory pleading failed to state a cause of action upon which relief could be granted. The District Court (MacMahon, Ch. J.), by Memorandum and Order dated December 3, 1980, granted the defendants' motion and dismissed the complaint as frivolous with respect to all defendants. Further, the court certified that any appeal from such order *in forma pauperis* would not be taken in good faith. Judgment, dismissing the complaint was filed on December 15,

1980. The Memorandum and Order of the District Court appear on pp. H27-H32 of the petition. A reading of the court's Memorandum Decision clearly reveals that the District Court reviewed plaintiff's claims of alleged constitutional and federal statutory violations, premised on in excess of thirty distinct federal statutes, and found them to be without merit. In its review, the District Court succinctly stated:

> Moreover, we cannot identify the relevance of any of the 26 statutes which the plaintiff pleads, or which of those statutes has been allegedly violated by any individual defendants [Memorandum and Order].[3]

The dismissal of the complaint as frivolous was based on Judge MacMahon's determination that the complaint failed to comply with Fed.R.Civ.P.8(a) which requires a plain and simple statement of the facts showing that the pleader is entitled to relief. In rendering its decision, the District Court correctly considered the standard of pleading applicable to a complaint, like the one at bar, which has been prepared by a *pro se* plaintiff [Memorandum and Order]. The District Court's further determination that an "appeal *in forma pauperis* would not be taken in good faith since an appeal would be frivolous" is fully consistent with the court's decision.

Subsequent to the court's dismissal of the complaint as to all defendants, the plaintiff appealed to the Court of Appeals for the Second Circuit. Petitioner there claimed that the District Court's dismissal of the complaint was improper. In connection therewith, he moved for an order pursuant to Rule 11(c) of the Fed.R.App.P. for an order

[3]Parenthetical references to "Memorandum and Order" refer to the Memorandum and Order of Judge MacMahon, dated December 3, 1980, which appears at pages H27-H32 of the Petition.

directing the clerk of the District Court to temporarily retain the record of this case. This motion was denied by Judge MacMahon. The Endorsement of the court, which appears at p. E12 of the petition, clearly states that the plaintiff failed to provide the court with any reason for retaining the record in the District Court.

Pending the appeal, petitioner also moved in the Court of Appeals for an order correcting the Record on Appeal, pursuant to Fed.R.App.P. 10(e) and for certification of constitutional questions. Both motions were denied by the Court of Appeals. These orders of the Court of Appeals appear at pp. F17 and G26, respectively, of the petition.

On appeal, the Court of Appeals for the Second Circuit affirmed the District Court's dismissal of the complaint, based on the plaintiff's total failure to comply with the requirements of Fed.R.Civ.P. 8(a). In so holding, the Court of Appeals concurred in Chief Judge MacMahon's determination that despite the latitude accorded to *pro se* litigants, the complaint exceeded "even generous limits for the type of document appropriate to commence a lawsuit in a federal district court." The order of the Court of Appeals for the Second Circuit appears at pp. B6-B7 of the petition.

Plaintiff-petitioner then sought rehearing of his case before the Court of Appeals. After consideration, the petition for rehearing was denied. The order of the Court of Appeals for the Second Circuit denying rehearing appears at pp. D10-D11 of the petition. It is from this determination that the petitioner now seeks review.

Reasons for Denying the Petition.

The petition presents nothing more than another attempt by the petitioner to seek further review of his vague

and bizarre allegations of conspiracy, which were found to be frivolous by both the District Court and the Court of Appeals for the Second Circuit.

The defendant-respondents, out of respect for the court and the plaintiff *pro se,* have endeavored to treat the allegations and purported issues raised thereby in a careful and thoughtful manner. However, no amount of deference to the petitioner's *pro se* status, nor charity of interpretation, can serve to exact a cognizable claim from the accusatory pleading. In assessing the purported claims of the plaintiff *pro se,* the District Court properly took note of the fact that Rule 8(a) of the Fed.R.Civ.P. requires that there be a plain and short statement showing the pleader's entitlement to relief [Memorandum and Order]. Clearly, as the District Court noted, this rule demands pleadings which permit the defendants and the court to determine the nature of the charges and to discern which, if any, of the defendants is being charged. *Walter Reade's Theatres, Inc. v. Loew's, Inc.,* 20 F.R.D. 579 (S.D.N.Y. 1957). There can be no serious dispute that the complaint defies rational interpretation.

As stated above, the District Court, in rendering its decision, properly considered the standard of pleading applicable to a complaint like the one at bar prepared by a plaintiff *pro se* [Memorandum and Order]. In this regard, this Court has held that in considering the sufficiency of a *pro se* complaint, the accusatory pleading is held to a lesser standard than pleadings prepared by an attorney. *Haines v. Kerner,* 404 U.S. 519, *reh. denied,* 405 U.S. 948 (1972). The Court of Appeals, in affirming the District Court's dismissal of plaintiff's complaint, held that even under these liberalized standards, plaintiff's accusatory pleading failed to state a cause of action upon which relief could be granted [Order]. *United States v. Dolan,* 452

F.2d 1078 (3d Cir. 1971). *Accord, Gray v. Creamer,* 465 F.2d 179, 182 n.2 (3d Cir. 1972). Where a pleading, such as the one at bar, contains only broad conclusory allegations which fail to set forth facts in support thereof, it is subject to dismissal. *See, DeFina v. Latimer,* 79 F.R.D. 5 (E.D.N.Y. 1977); *Campbell v. Patterson,* 377 F.Supp. 71 (S.D.N.Y. 1974).

Petitioner's claims of conspiracy are not premised on any allegations of overt acts; in fact, rather than reciting a conspiracy and the acts done in furtherance thereof, the petitioner engages in a reverse thought process: he recites countless unconnected "acts" and relates them with a meaningless claim of conspiracy. This is a complete distortion of the charge of conspiracy. Moreover, a claim of civil conspiracy requires a showing of an agreement between the parties to effect a wrong against another or to cause some injury, which results in damage. *Rotermund v. U.S. Steel Corp.,* 474 F.2d 1139 (8th Cir. 1973). The complaint at bar is devoid of any allegation of agreement, nor does it provide even a scintilla of circumstantial evidence of a single plan, the fundamentals of which were known to each person who is to be held liable for its consequences. Such a showing is an essential element to plead conspiracy. *Hoffman-LaRoche, Inc. v. Greenberg,* 447 F.2d 872 (7th Cir. 1971). Petitioner's conclusory and vague allegations of conspiracy were, in fact, doomed to fail. The claims of conspiracy proffered by the petition were totally without foundation or support. The District Court concluded that:

> [N]either the Court nor the defendants can even vaguely discern any basis for granting plaintiff the relief requested [Memorandum and Order].

The fact that plaintiff-petitioner has failed to allege any cognizable claim upon which relief can be granted is fully

borne out by the record. Petitioner's morass of allegations, as well as his status as a *pro se* litigant, were appropriately and thoughtfully considered by the District Court. Thereafter, plaintiff's claims were subjected to appellate review and were twice rejected by the Court of Appeals as lacking in merit. Therefore, unless the petitioner's *pro se* status alone entitles him to yet further review, it is respectfully submitted that this case fails to present any basis for the granting of a writ of certiorari.

Conclusion.

For these reasons, the plaintiff-petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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